



Nudge: Three Degrees Of Concern

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POLICY BRIEFING 7

2015

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Nudging is hugely popular with governments but it is a practice that raises both conceptual and controversial issues. Three degrees of nudge can be distinguished and these raise different concerns.

When contemplating nudging, moreover, it is essential to be clear and open about the philosophical basis for such action and to be aware that clashes between different modes of intervention may threaten not only effectiveness but also the serving of representative and ethical ends.

This paper argues, first, that, before nudging is further embraced, it is necessary to think much more clearly about the concept of nudge and to distinguish between the different degrees of nudge that can be applied to targets. Second, that different degrees of nudge can present distinct issues of effectiveness, representation and ethics. Third, that a number of important issues are easily overlooked if nudge is seen as just another tool of state control.

'Nudging' involves structuring the choices that people make so as to lead them towards particular outcomes. Placing fruit next to the supermarket till, for example, gives a nudge towards healthy eating. Such 'behaviour change' strategies have become hugely popular with administrations on both sides of the Atlantic. (The site of the UK Behavioural Insights Team is at: <http://www.behaviouralinsights.co.uk>)

THE RISE OF NUDGE

'Nudge' is associated with Thaler and Sunstein's 2008 book of that title. The two authors see 'nudge' as: '... any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives'. To count as a nudge, the intervention must be 'easy and cheap to avoid'. In this conception the 'choice architecture' is the environment that frames an individual's choice. Thus, it is said that putting the fruit at eye level counts as a nudge but banning junk food does not.

Nudge builds on the insights of cognitive psychology and behavioural economics. Individuals are seen as constrained by limitations of information, cognitive capacity and self-control and as tending to make poor decisions that do not serve their welfare. Nudges shift such decisions and build on a philosophy entitled 'libertarian paternalism'. Thus, nudge is said to possess a paternalistic dimension in stimulating choices that are seen as welfare enhancing. At the same time it is said to be liberal as it leaves the target person or firm free to choose to take the non-sensible course of action.

Thaler and Sunstein give examples of at least seven nudge tools. These include defaults (opt-out rules) and design approaches – as where the main office doors lead directly to the stairs not the lifts. Information supplies and reminders can also serve to foster healthy decisions.

THREE DEGREES OF NUDGE

Three 'degrees of nudge' can be distinguished. 'First Degree nudges', such as simple warnings or reminders respect the decision-making autonomy of the individual and enhance reflective decision-making. ('There are three weeks left to complete the tax return.'). A 'Second Degree nudge' is more serious and typically builds on behavioural limitations so as to bias a decision in the desired direction. Thus, a default rule with an opt-out can be used to shape decisions (e.g. in presumed consent to organ donation), as may designs of the physical environment (e.g. where the office smoking zone

is placed at a distance from the work area). Both of these examples nudge individuals' decisions by relying on human inertia.

The Second Degree nudge involves a greater impact on individual autonomy than the First Degree nudge since the target's 'automatic' responses will in practice lead him or her to accept the nudge with limited awareness - though the target of the nudge would be capable, on reflection, of realising that a nudge has been administered.

A 'Third Degree nudge' offers a yet more serious intrusion on autonomy because it involves behavioural manipulation to an extent that other nudges do not. Thus, a cigarette pack might show a graphic display of a corpse. The 'manipulation' stems, in the cigarette example, from the use of a message with an emotional power that blocks the consideration of all options and threatens the agent's ability to act in accordance with her or his own preferences (as opposed to someone else's).

The difference between a Second and a Third Degree nudge is that, with the former, the message receiver has the practical potential to uncover the nudge, and assess its extent, by the exercise of reflection whereas, in the latter, this is to a greater extent blocked.

THE EFFECTIVENESS OF NUDGES

A limitation of the nudge is that a focus on individual choices may fail to address the causes of, or fail to provide the solution to, a number of problems. Obesity, for example, may be seen by nudge advocates to be the result of an accumulation of poor individual decisions (which can be improved by nudges) but this vision fails to take on board a host of biological, social and cultural causes of obesity. Nudges that are aimed at individuals, moreover, will not always prove effective when the undesirable behaviour at issue is the product of collective processes and policies (for example in a corporation).

A second limitation is that individuals' responses to nudges will differ across divergent institutional, social,

economic and cultural contexts. A nudge to encourage recycling may not work as well in a disadvantaged community as in an affluent district. Even a First Degree nudge, such as simple information supply, may prove effective only with a small minority of targets. Nudges that are genuinely paternalistic (Second and Third Degree nudges) may, moreover, undermine trust. Thus, in the field of medicine it has been warned that nudges can be seen as scare tactics by patients and that this can alienate them from medical staff and prejudice treatment.

It has also been pointed out that consumers may react perversely to nudges and 'counter-nudging' may also occur. The latter is exemplified when a retailer is instructed to limit displays of alcohol but counters with an advertising promotion.

REPRESENTATIONAL AND ETHICAL ISSUES

Objectors to nudge argue that the device lacks the transparency and public deliberation that are normally associated with command regimes. If a government issues a law that prohibits citizens from smoking in public places, representative processes will have been followed. If nudging is used, the process may be far more secretive—the nudge, for instance, may flow from an administrator's decision on the design of a public building: a decision not subjected to advanced disclosure or accessible debate.

Second and Third Degree nudges, it is also said, do not involve seeking to identify the conception of welfare that the target would espouse. Rather, the nudger acts in a semi-covert or covert manner to further the nudger's own conception of the target's welfare – which may involve re-shaping the target's idea of their own welfare. Nudge proponents treat welfare as uncontroversial but

it has been pointed out that many may agree in the abstract that better health is preferable to worse health, but if there is a choice between, say, enjoying life-shortening but intensely pleasurable vices during one's college days versus abstaining during college to gain a couple of extra boring years at an advanced age, then better health may not look as unquestionably good.

Thaler and Sunstein emphasise that a nudge should be 'easy and cheap to avoid' but the nudge has power in so far as it impacts on the decision-maker of limited cognitive capacity, information and self-control. Those very limitations arguably mean that the target is unlikely to be well-placed to exercise the opt-out in cases of Second and Third Degree nudges. With Third Degree nudges, the position is especially poor because the target will be 'blocked' to a greater extent from resorting to the opt-out.

Cumulations of nudges (of the Second and Third Degree) may also be an issue. They produce an aggregate burden and the worry is that the individual fights an unending battle to construct his or her own preferences and to opt-out in order to further those preferences.

An issue of fairness also arises with Second and Third Degree nudges – they impose costs on sensible persons in order to enhance the welfare of others who behave irresponsibly. Thus, a law requiring all retail outlets to place alcohol in locked cabinets (for sale on express request) would inconvenience the 90 or so per cent of the population who are able to limit their consumption to below 'harmful' levels.

Another defence of nudge argues that there is always a nudge from some direction. There is, though, an argument that to respond to

nudges with state-applied counter nudges of the Second and Third Degree is exactly the wrong policy in those cases where proliferations of nudges produce citizens with 'choice structuring fatigue' and they positively discourage the kinds of learning, responsible and thinking behaviour that most governments espouse. Many citizens, moreover, may be unhappy about state Second and Third Degree nudges in a way that they are not about commercial influences.

ANOTHER TOOL IN THE BOX?

At first glance, the safest conclusion to draw about nudge would seem to be that this may not be the complete answer to governmental control but it is a very useful device to have in the regulatory toolbox. The concern here, though, is that some tools of intervention operate on quite different philosophical and ethical assumptions. Classical command and control rules of regulation, and economic incentives, tend to build on, and respect, the rationality of persons whereas Second and Third Degree nudges generally exploit the limited cognitive, volitional and emotional capacities of individuals.

Nudge may be here to stay but it is essential to distinguish between the different degrees of nudge and to resist arguing for Second and Third Degree nudges as if they are of the first degree. It is important, moreover, to be aware of the device's practical limitations and to avoid the assumption that this is just another un-contentious tool of governmental control.

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(For a fully argued and referenced version of this paper see R. Baldwin, 'From Regulation to Behaviour Change: Giving Nudge the Third Degree' (2014) 77(6) *Modern Law Review* 831–857
<http://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12094/pdf>)

LONDON

FEBRUARY 2015

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His research focuses on regulatory strategies and evaluation with emphasis on: impact assessment; risk-based regulation; intervention techniques; enforcement practices; regulatory change and better regulation.

His books include *The Government of Risk* (2001) Oxford University Press (with C. Hood and H. Rothstein); *The Oxford Handbook of Regulation* (Oxford, 2010, with Martin Cave and Martin Lodge) and *Understanding Regulation* (Oxford, second edition 2011, with Martin Cave and Martin Lodge). Recent articles deal with lower risks; managing regulatory change and nudge strategies.



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